

SEP 25 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 78-9

PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner,

VS.

CITY OF SANTA CLARA, CALIFORNIA,
Respondent.

Reply Brief in Support of Petition for Certiorari

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INTRODUCTION

Pacific Gas and Electric Company ("PGandE") has filed a petition seeking review of two questions—(1) whether the preference clause of the Reclamation Act of 1939 should be broadly construed to prohibit certain conditional sales of hydroelectric power to nonpreference customers and (2) whether retroactive equitable relief is available in a case such as this. The City of Santa Clara's brief in opposition seeks to raise questions of fact and argues the merits of the issues presented at some length; it does not, however, directly dispute the importance of the issues presented nor the propriety of review by certiorari. Nonetheless, the Santa Clara brief calls for a response on a few points arguably relevant to the question of whether certiorari should be granted.

I. Santa Clara's Brief In Opposition Does Not Dispute That the Court of Appeals' Interpretation of the Preference Clause Is Contrary to an Administrative Interpretation of the Statute.

PGandE first argued in support of its Petition For Certiorari that the Court of Appeals' decision should be reviewed because, contrary to such decisions as *Train v. Natural Resources Defense Council*, 421 U.S. 60, 87 (1975), it rejected a reasonable administrative interpretation of a statute, approved by the district court, on which PGandE and many other entities had relied.

Certainly the Court of Appeals' decision that sales of CVP power to PGandE for banking and later delivery to preference customers violates the preference clause is contrary to the interpretation of the statute by the Secretary of the Interior. Santa Clara does not argue otherwise. Rather, Santa Clara appears to contend that the interpretation of the preference clause adopted by the Secretary of the Interior and the federal district court is not a "reasonable" interpretation of the statute, and, therefore, that the contrary interpretation adopted by the Court of Appeals need not be reviewed.

At the outset it is worth noting that a statutory interpretation accepted both by the agency charged with administration of a statute and a federal district judge is difficult to characterize as not a reasonable interpretation. In any event, Santa Clara's position that the Court of Appeals' construction of the preference clause is the only reasonable construction is flawed by errors of both fact and law.

A. THE INTERPRETATION OF THE PREFERENCE CLAUSE BY THE SECRETARY OF THE INTERIOR AND THE DISTRICT COURT IS A REASONABLE INTERPRETATION OF THE STATUTE; ITS REVERSAL BY THE COURT OF APPEALS SHOULD BE REVIEWED.

Santa Clara argues at some length to conclude that the Court of Appeals' application of the preference clause to banking transactions is "consistent with all existing authority on the subject." Brief in Opposition at 12. Viewed as a response to PGandE's Petition For Certiorari, this argument suggests that the Court of Appeals' interpretation of the preference clause is the only reasonable interpretation possible. The difficult burden of sustaining that position simply has not been met.

The question on the merits is whether it is reasonable to conclude that conditional sales of federal hydroelectric power to a nonpreference entity for "banking" do not violate the preference clause where all banked power is committed to later repurchase for delivery to preference customers and where the banking arrangement is necessary to meet the long term power needs of those customers. The Secretary of the Interior and District Court concluded that it was reasonable to so interpret the preference clause. As stated by the district court:

"In essence, energy is "banked" by PGandE for future Bureau use. The bank account provisions of the contract were included to enable the Secretary of the Interior to carry out a power marketing plan developed in 1964 to meet the long-term needs of preference customers. The withdrawals of power from Santa Clara beginning in 1971 were made as a part of this plan. In order for the Bureau to satisfy load growth of the then existing preference customers through 1980 (the time targeted in the 1964 marketing scheme), and at the same time have power available for anticipated Bureau loads coming on line (such as the San Luis

pumping unit scheduled for 1966-67), it was necessary to make provision in the scheme for some sort of power banking arrangement, and the Bureau—PG&E contract does just that. Hence, the court finds that the ‘sales’ of power to PG&E do not violate the preference provisions of 43 U.S.C. § 485h(e).”

PGandE Appendix C at 58-59 (footnotes omitted).

In its Petition For Certiorari, PGandE urged that one point establishing the reasonableness of this interpretation was the fact that in opting to sell power to PGandE for banking rather than to sell unconditionally to Santa Clara, the government was not choosing between equal offers. Thus the banking transaction with PGandE did not violate the “preference” requirement. Santa Clara attacks only this argument and ignores the equally important point that the banking arrangement was necessary to a long term plan for marketing all CVP power to selected preference customers. While in this Reply Brief we respond only to Santa Clara’s argument, the fact that the primary rationale of the District Court and Interior Department was left unchallenged in itself suggests that Santa Clara’s interpretation of the preference clause is not the only reasonable interpretation.

Santa Clara’s attack on PGandE’s argument that the government did not violate the requirement of “preference” because it was not choosing between equal offers relies solely on what Santa Clara claims to be the “plain meaning” of the statute and on decisions and opinions construing laws other than the one at bar.

Santa Clara’s argument that the “plain meaning” of the preference clause precludes the interpretation adopted by the Secretary of the Interior and the District Court is obviously wrong. The meaning attributed to the statute by

Santa Clara was not plain to the Interior Department or the District Court. The language of the statute merely provides:

“in said sales or leases preference shall be given to municipalities and other public corporations or agencies . . .”

Thus, the statute by its terms does not address the question of whether an immediate sale to a preference customer must take precedence over a later sale to a preference customer, to whom the government chooses to sell over a longer term, merely because the latter sale requires interim “banking” with a nonpreference entity. Nor does the statutory term “preference” require anything more than selling to a “preference agency” when faced with two equal offers.

When the plain meaning of a statute provides no guidance on a particular application of the law, the next usual recourse is to legislative history. Such legislative history of the Reclamation Act of 1939 as is pertinent supports the construction given the statute by PGandE. While Santa Clara characterizes the legislative history relied on by PGandE as “sparse,” it comes up with no legislative history to support its contrary interpretation of the law. Lacking any reasonable argument based on the statute or legislative history, Santa Clara ranges far afield to seek support for its position that the preference clause mandates sales to a preference customer even though that customer offers less favorable terms than those available from a nonpreference purchaser.

Santa Clara first asserts that the decision below was “mandated” by the decision in *United States v. City and County of San Francisco*, 310 U.S. 16 (1940). The difficulty with the argument is that *United States v. San Francisco* dealt with a statute which *prohibited* the City from selling

power to any private person or corporation for resale. 310 U.S. at 18-19. Thus the Court was not there interpreting a preference clause at all.

Next Santa Clara urges that the rate setting provisions of the Flood Control Act of 1944, 16 U.S.C. § 825s, are inconsistent with a "better offer" construction of the preference clause because they contemplate that all power will be sold at the same, cost-based price. One fundamental flaw in Santa Clara's argument is that the Flood Control Act has nothing to do with rates for CVP power, which are governed by section 9(c) of the Reclamation Act of 1939, 43 U.S.C. § 485h(c). In any event, Santa Clara misconstrues PGandE's argument. PGandE does not maintain that it offered a higher price for CVP power. PGandE's position is that it was willing to offer better *terms* to the Secretary than Santa Clara. Even if the provision of 16 U.S.C. § 825s quoted by Santa Clara were pertinent, it is manifestly limited to the *price* of power. It says nothing as to other terms and conditions for which the Secretary might negotiate, such as an agreement to resell an equivalent amount of power at a later date.

Finally, Santa Clara turns to an opinion of the Attorney General, 41 Op. Att'y Gen. 236 (1955), construing the Flood Control Act of 1944. That opinion, which is more an *ex cathedra* pronouncement than a reasoned conclusion based on statute or precedent, deals with a statute passed after the Reclamation Act of 1939 at issue here and which had a different legislative history. More importantly, the opinion considers a different question than that presented by the case at bar. The issue faced by the Attorney General was whether, given the choice of a sale of power to a preference entity for resale to other preference customers or to a non-preference entity for resale to those same customers, the

federal agency seller had to give the preference entity purchaser a reasonable opportunity to arrange for transmission before entering into a contract with the non-preference entity. The opinion was that a preference purchaser should be given a reasonable opportunity to arrange for transmission, but if it failed to do so, the power could be sold to the nonpreference entity. *Id.* at 243-44. Assuming *arguendo* the correctness of the opinion, which we consider erroneous, the facts it considers are so different from those at bar that the opinion provides no guidance here. No banking was involved, the competing offers from the preference and nonpreference entities provided identical benefits to the government, and the ultimate distribution of the power among preference customers was not changed under either alternative.

Far from meeting the burden of establishing that the reading of the preference clause advocated by Santa Clara and the Court of Appeals is the only reasonable interpretation, Santa Clara's legal arguments fail even to establish that the broad interpretation it espouses is itself a reasonable reading of the statute.

B. SANTA CLARA ERRONEOUSLY ARGUES THAT PGandE PROFITS FROM BANKING TRANSACTIONS.

Aside from the flaws in its legal arguments, Santa Clara's brief in opposition suffers from a fundamental error of fact. Santa Clara argues throughout its brief that PGandE profits by its purchase of CVP power for banking. This argument, however, is directly contradicted by the only evidence in the record on the point. An uncontradicted affidavit in the record below establishes that CVP power purchased by PGandE for banking is resold to PGandE customers at cost. (R 614). There is no other evidence even remotely pertinent to the point. Santa Clara's claims to

the contrary are mere unsubstantiated and speculative assertions.

The question of whether PGandE profits by banking transactions was first raised by the Court of Appeals. The trial court made no finding with respect to whether PGandE profits by the banking transactions. For reasons not clearly discernible from its opinion, the Court of Appeals, in reaching its decision on the application of the preference clause to banking transactions, asserted that CVP power banked with PGandE was "resold by PGandE to its own customers at a substantial markup." PGandE Certiorari Petition Appendix A at 19. This unsupported assertion is now relied on by Santa Clara as the basis for its argument. Brief in Opposition at 3.

The source of the Ninth Circuit's misapprehension appears to be the fact that PGandE's rates are higher than CVP's rates. The District Court noted this fact, PGandE Appendix C at 46. PGandE does not dispute it. However, the Ninth Circuit could not properly conclude from the fact that PGandE rates are higher than CVP rates that PGandE is reselling CVP power at a "markup."

CVP is but one of many sources of the power delivered by PGandE to its own customers. CVP power banked with PGandE is mixed with power from other, more expensive sources. The resulting mix is sold at a regulated, system *average* rate which directly passes through to PGandE's customers the cost savings obtained through power purchase transactions, such as the purchase of CVP power.* Thus, while all PGandE's customers (including Santa Clara) benefit from the purchase of CVP power by PGandE, PGandE does not itself profit from these transactions. There is absolutely no basis in the record or elsewhere to

*See PGandE Petition For Certiorari at 13, note.

support Santa Clara's and the Ninth Circuit's assertions that PGandE profits from banking transactions. The only record evidence establishes that PGandE does not profit from banking transactions.

Neither the Secretary of the Interior nor the District Court considered whether PGandE made a profit in reaching their conclusion that banking CVP power did not violate the preference clause. It was enough for them that banking was an essential element in a plan to meet the long term needs of selected preference customers. PGandE Appendix C at 58-59. In reaching a contrary ruling, the Court of Appeals injected this new consideration, regrettably misconstruing the record. Thus, apparently influenced by its erroneous assumption that PGandE profits from banking transactions, the Court of Appeals has rejected a reasonable administrative interpretation of the preference clause. That rejection should be reviewed.

A review of Santa Clara's arguments has revealed no basis for concluding that the Court of Appeals' interpretation of the preference clause is the only reasonable interpretation of the statute. Certiorari should therefore be granted.

II. The Question of Whether Retroactive Effect Should Be Given to a Court's Reversal of a Reasonable Administrative Interpretation Is Important and Should Be Reviewed.

PGandE's Petition For Certiorari further requests this Court to review the Ninth Circuit's ruling that past, completed sales of CVP power to PGandE are "void if unlawful," PGandE Appendix A at 33, under the Court's new interpretation of the preference clause. The broad question of whether and in what circumstances retroactive effect should be given to reversals of administrative interpretations of a statute is an important one. The line of cases

cited in the PGandE Certiorari Petition at 11, culminating in *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975), establishes the substantial deference given by this Court to administrative interpretations of a statute. That deference itself suggests that third parties such as PGandE should be able to rely on such administrative interpretations without threat of loss caused by a retroactive effect of contrary judicial interpretations.

Santa Clara's argument on the propriety of retroactive equitable relief in this case is plagued by the same errors of fact and law pointed out above—assumptions that PGandE profits from banking transactions and that banking is clearly unlawful. Only two new arguments deserve further comment.

A. SANTA CLARA CANNOT DISTINGUISH THE MOSER AND CORNIEL-RODRIGUEZ DECISIONS.

PGandE has argued that the Ninth Circuit's ruling, that past banking transactions are void if found to violate the preference clause, conflicts with *Moser v. United States*, 341 U.S. 41 (1951) and *Corniel-Rodriguez v. I.N.S.*, 532 F.2d 301 (2d Cir. 1976). See PGandE Petition at 16-17. Santa Clara attempts to distinguish the cited cases on the grounds that they involve a "sensitive question" concerning the application of immigration laws and that "unlike the instant situation there [was] no competition between applicants" for the federal benefits involved in those cases. Whether the sensitive question of retroactive relief arises from the immigration laws or reclamation law is hardly pertinent. As to the second purported distinction, there is, contrary to Santa Clara's argument, competition among applicants to get and keep immigration visas, see *Corniel-Rodriguez*, *supra*, 532 F.2d at 303, but the existence of competition for a federal benefit is not the issue. The issue

is whether agency actions on which PGandE justifiably relied are necessarily void because of a subsequent judicial decision that they were technically unlawful. See PGandE Petition at 16-17. *Moser* and *Corniel-Rodriguez* suggest that the answer is no.

B. THE ESCROW AGREEMENT DOES NOT AFFECT THE QUESTION OF RETROACTIVE RELIEF.

Santa Clara's concluding argument is that PGandE bargained away its right to object to retroactive relief by entering into an escrow agreement with Santa Clara. The argument misconstrues both the escrow contract and the problem posed by retroactive relief. Faced with the alternative of nonpayment of PGandE's bills to Santa Clara for power delivered to the City, PGandE agreed to allow Santa Clara to pay the disputed funds into escrow. The escrow agreement provides that the funds will be distributed in accordance with the final decision in this case. It does not waive PGandE's right to argue to the courts that equitable considerations preclude payment of the escrow funds to Santa Clara. Moreover, the problem of retroactive relief arises not solely from the sale of PGandE power to Santa Clara, the payment for which was placed in escrow, but primarily from the fact that PGandE has resold "banked" CVP power at cost to millions of different customers. Those sales cannot be rescinded and the escrow arrangement has no effect on them. In short, the escrow arrangement has nothing to do with whether the Court of Appeals' reversal of an administrative interpretation of a statute should be given retroactive effect.

III. The Questions Presented by PGandE Should Be Reviewed at This Time.

In the federal Respondent's brief in opposition, the federal government agrees with PGandE that the Court of Appeals erred in its construction of the preference clause, but concludes that the question should not be reviewed until after further proceedings on remand. We agree that the Court of Appeals' decision does not preclude the possibility that PGandE might ultimately prevail in this case. However, as explained in more detail in Part III of PGandE's Petition For Certiorari at 19-20, that fact does not preclude review by certiorari at this juncture, and the important reasons there stated for immediate review are not disputed by the government.

IV. Conclusion

Because the questions presented by PGandE's Petition are important to the further conduct of this case and to large numbers of people who receive power from CVP and other federal reclamation projects, certiorari should be granted.

Respectfully submitted,

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